further severe punishment for a later offence which does not intrinsically call for it.

Another case of some relevance is that of *Withers*[3], in which a sentence of 4 years penal servitude had been passed, due to the prevalence of the crime (Receiving) in the particular locality and a deterrent sentence being necessary. The Court of Criminal Appeal's Judgment stated :—

> That is a proper consideration so long as it does not result in a convicted man being made the scapegoat of other people who have committed similar crimes but have not been caught and convicted.

In my opinion it is necessary to examine the facts and circumstances of each individual case. Normally the appeal Court should not interfere with the discretion of the Court below in regard to sentences and I agree entirely with the principles enunciated in *Gumbs Case*[2] that I have referred to. A lower Court is more in touch with the local affairs and daily comings and goings of the greater part of the community than is the High Court and is, in my opinion, in a better position to exercise a discretion in the matter of sentences, more particularly in respect of minor offences and breaches of the law that are almost of daily occurrence. Such sentences should not, in my opinion be interfered with by a higher Court, merely because the individual presiding in the higher Court might, having personal views on the matter, have passed a different sentence.

There must be a manifest error, either in law or in considering the facts and circumstances of the case or an omission to consider such facts and circumstances, before the higher Court interferes with the discretion undoubtedly vested in the lower Court.

I agree with the learned Magistrate that in both cases, the offenders were first offenders and that in neither case was there deliberation or premeditation. I also agree with him as to the local custom and that from an unconditional gift to a bribe is a small step. But in my opinion there is the world of difference between a gratification, illegal or otherwise, as between business firms and a gratification to a Government or public servant carrying out official duties when such gratification is obviously meant to influence such public servant in carrying out, or in refraining from carrying out, his official duties. The maximum punishment for such an offence is 3 years' imprisonment and/or a fine.

Bribery and corruption of officialdom is like a cancer which may grow and destroy the whole body as, I conjecture, is illustrated by recent events in China. Operative treatment at the commencement may or may not be a cure but it is worth trying. Like Caesar's wife, officials, (including Judges) must be above suspicion and lack of confidence in this respect strikes at the whole foundation of good Government.

In my opinion the learned Magistrate failed to take these matters into consideration and I therefore feel justified in varying the sentences passed by him. In doing so, I take into consideration the other matters quite rightly mentioned by him and the facts and circumstances of each case but even so, I do not think that the mere imposition of a fine is likely to act as a deterrent in this class of offence.

Leck Kwee Ser will go to prison for one month's R.I. and Teo Cheng Lian to prison for 2 months' R.I. Confiscation of the respective bribes are confirmed. Fines imposed and paid to be returned.

Order Accordingly.

IN THE ESTATE OF YEOW KIAN KEE (DECEASED); ER GEK CHENG v. HO YING SENG.

[Orig. Civil Juris. (Murray-Aynsley, C.J.) June 28, 1949]

[Singapore — Probate No. 337 of 1948]

Chinese Marriage — Plurality of marriage — Legal requirements for Chinese marriage — Consensual conception of marriage.

The question for decision in this case was whether the plaintiff was one of the widows of Yeow Kian Kee (deceased). The Plaintiff claimed to be a t'sip of the deceased.

Held, (1) that by the law of the Colony a male Chinese, not a Christian, who is domiciled in the Colony can have an unlimited number of t'sips; (2) that for the legal requirements of a marriage with a t'sai or a t'sip, the law of the Colony merely requires a consensual marriage, that is, an agreement to form a relationship that comes within the English definition of marriage, a relationship which need not be life long but must be one of indefinite duration; (3) that the requirements of a ceremony, of a formal contract and of repute of marriage are evidentiary only and not essential to the acquisition of the status of a t'sip; (4) that on the facts of this case, the plaintiff had acquired the status of a t'sip.

Cases referred to :—

(1) *Queen v. Millis,* 10 Cl. and F. 534.

(2) *The Six Widow's Case,* 12 S.S.L.R. 120.

PROBATE SUIT.

Philip Hoalim for Plaintiff.

P. J. Johnson and *R. Boswell* for Defendant.

Murray-Aynsley, C. J. : — The question to be decided in the present proceeding is whether Er Gek Cheng is one of the widows of Yeow Kian Kee. To decide this question of fact an issue was, by an Order dated August 27th last, directed to be tried, to proceed

as an action with Er Gek Cheng as Plaintiff and Ho Ying Seng as Defendant.

The plaintiff claims to be a secondary wife of Yeow Kian Kee, who after some changes of fortune became proprietor of a shoe shop in Middle Road in this city.

Cases of this kind have been fairly numerous in this Colony and by this time the law is, I think, settled, though it is not satisfactory.

To begin with, the Courts in an attempt to apply English law to Chinese custom made the t'sip, for purposes of inheritance, equivalent to the t'sai, which gave her a position which she had not enjoyed in China. At the same time the Courts have, as regards legitimacy, made marriage an essential condition, which is far removed from Chinese ideas, and, therefore, in order to prevent persons, who would according to Chinese ideas be entitled to a share in their father's property, from being deprived of it, unions have been held to be true marriages which would not have been so regarded by the Chinese. The Chinese have not I think any idea of legitimacy as distinct from paternity. Chinese ideas of marriage do not correspond with those upon which the English legal conception of marriage is based; the t'sip in particular does not correspond exactly to a wife or to a concubine, and the decisions of the Courts in giving the children of a t'sip legitimacy and rights of inheritance have made that union equivalent to true marriage. This is foreign to Chinese ideas, to them inheritance would depend on paternity and not on the status of the mother. According to Chinese ideas and custom neither a t'sai nor a t'sip would be entitled to a share of the husband's estate on a division. Both would be entitled to maintenance in the family house as long as, but only as long as, they chose to remain there. In this Colony both the t'sai and t'sip have an equal right to share in the distribution.

The fact that the t'sip has become something different from what she was in China has given the Courts problems which would not have arisen if it were merely a question of applying Chinese custom. If the t'sip were being maintained at the time of the death of the man she would continue to be maintained, and such children of the man who had been recognized as such would share his estate whatever the status of their mothers might have been.

The Courts have decided that any male Chinese not a Christian domiciled in the Colony can have an unlimited number of t'sips. The status of a t'sip has its origin in contract. That is, it is simply consensual. No formalities are necessary. The only requirements of this and other Chinese marriages are that the personal status of both parties is such that they can legally enter into such a contract. This excludes Christians and, as in other cases of unions of a polygamous character, all persons who by the law of their domicile are monogamous.

The legal requirements for marriage with a t'sai and a t'sip are, I think, the same. This means that the law of this Colony merely requires a consensual marriage, that is, an agreement to form a relationship that comes within the English definition of marriage. It is no longer any part of that conception that such a relationship must be life-long. It merely means one of indefinite duration as distinct from one for a definite period as is allowed among Moslems.

This consensual conception of marriage was originally, in my opinion, that of the common law of England, but I shall now explain how, in England, the position has been obscured.

Since Lord Hardwicke's Marriage Act, the preoccupation with the formalities of the investitive act has obscured in English minds all conception of the fundamental character of the institution of marriage. It is quite certain that at one time the requirements of the Canon Law were as simple as those that the Privy Council regards as necessary in the case of t'sips; that is, mutual promises, *verba de presenti*. This lack of formality led to the sort of trouble that we have had in the present case. Various attempts were made to ensure that the thing was done publicly. But the clandestine marriage remained merely irregular, that is to say, it was a sin to take part in one; it did not prevent the marriage from being valid. The presence of a priest was required by various examples of ecclesiastical legislation on the subject. It was never suggested that more than the mere presence of a priest was required or that the intervention of a priest was necessary to give validity to the act of marriage; it was merely necessary for the purpose of giving notoriety. This form of legislation took its final form in the Decrees of the Council of Trent, which, of course, were never received as part of the law of England. Between the Reformation and Lord Hardwicke's Act the mediaeval Canon Law continued to be the only law on the subject. Scotland continued, until a few years ago, to enjoy the benefits and disadvantages of that system. Logically that system should have prevailed in England. There were certain Protestant sects, notably the Quakers, who could not have contracted valid marriages unless that was the law. Later there

were considerable numbers of Jews who were British subjects and domiciled in England. Lord Hardwicke's Act exempts the marriages of Jews and Quakers from its provisions which seems to indicate that they were previously regarded as valid, which could only be the case if the law accepted the consensual view of marriage. There are indications that except for acquiring a right to dower *"ad ostium ecclesiae"* an informal or consensual marriage was treated as equally effective as a formal one. There is not, however, any decisive authority on the subject.

By 1844 the old law before Lord Hardwicke's Act seems to have been generally forgotten, and the matter came before the House of Lords in the case of the *Queen v. Millis*[1]. That was a writ of error arising out of a prosecution for bigamy in Ireland (where Lord Hardwicke's Act was not in force). There was a remarkable division of opinion. The Court of Queen's Bench in Ireland was equally divided and only reached a decision against the validity of an informal marriage (that is one not taking place in the presence of a priest of the Church of Ireland) by the withdrawal of his opinion by the junior of the Judges. When the case came before the House of Lords the six peers who voted were equally divided. Tindal, C.J., delivered the advice of the Common Law Judges, which was against the validity of the marriage in question. Undecisive as the case was, it seems to be the foundation of the present view of marriages at Common Law followed by English Courts, that the presence of an episcopally ordained clergyman is essential. It has not been applied in India nor has it been followed in the United States or in Canada. If it represents the Common Law it should logically apply in this Colony in all cases where there is no statutory provision. It has not been applied by the Privy Council; therefore, we in this Colony can assume that it is not law. In the absence of that authority we can assume that the law governing marriages in this Colony (where there is no statutory provision) is that of the mediaeval Canon Law, which, as I have said, was preserved in its purity in Scotland until a few years ago.

I think that it is only on the basis of consensual marriage that the Courts can have regarded the validity of Jewish marriages before there was any statutory provision for them. This the Courts in England certainly did. They professed to treat the matter as one of foreign law. But in the case of marriages between British subjects, domiciled in England, this could not have been the case. I think in these cases the observances of rites and ceremonies is merely evidence of intention. As with us, the use of Hindu marriage ceremonies is not a matter of legal requirement, it is merely evidence.

In the case of Chinese marriages, in most cases, the ceremonies regarded as essential at the time of the *Six Widows Case*[2] have disappeared and there remains a simple form of consensual marriage, quite in conformity with the requirements of the Canon Law.

Therefore, if we adopt this conception we have a rational doctrine which can be applied in all cases which have not been especially provided for by statute.

With these simple legal requirements the difficulties that have troubled the Courts have been merely questions of evidence. The burden of proof is upon whoever alleges the status of t'sip to have existed. What must be proved in order to discharge that burden? In most cases there is some sort of a ceremony, and there is recognition of the t'sip as a member of the husband's family. But this is evidentiary only. It is not essential to the acquisition of the status of t'sip. A formal contract in writing would be conclusive. If the parties were to live as such publicly so as to acquire the reputation of being man and t'sip that would also be evidence that the status had been acquired. On the other hand, I do not consider that mere cohabitation for a considerable period would by itself be sufficient evidence.

In the present case the plaintiff alleges that some sort of a ceremony took place at 61 Tanjong Pagar Road on October 15th, 1932, and that members of the family of the deceased attended. I think that the union could not have started at that time because the deceased appears to have joined the Johore Police Force as a detective and to have been so employed in Johore from 27.6.1931 until 31.7.1933. Further the plaintiff does not seem to have known the deceased until he was established in Middle Road, which appears to have been some time about 1934.

I was not, apart from this, impressed by the plaintiff or by her witnesses, and in spite of what the plaintiff and her witnesses said I have come to the conclusion that the relations between the plaintiff and the deceased were unknown to the defendant and to other members of the family of the deceased until after his death.

If the case had depended entirely on verbal evidence it would not have amounted to much. But there is other evidence. It appears that in the year 1941 the deceased had a photograph taken, which

showed him in company with the plaintiff and a child who appeared to be 10 to 11 months old. The photographer says that the deceased introduced the plaintiff as his wife. It is not difficult to assume that when a person is photographed in this way that he considers himself to be the father of the child, and it is natural to introduce the mother of the child as a wife. But I do not think that such a form of introduction is at all strong evidence of status. In February 1941, it appears that the plaintiff had a child vaccinated under the name of Yeow Chin Fong, son of Yeow Kang Kee. I can assume that this was the same child as appears in the photograph. By itself this document does not prove anything as there is no evidence that the deceased had anything to do with the transaction. There does not seem to have been any birth certificate.

During the Japanese occupation the plaintiff seems to have been living in Liang Seah Street and there was produced a census card containing the names of Yeow Yong, aged 60, Er Gek, aged 44, and Yeow Chin Fong aged 6. This was dated 23.4.43. This is of little value by itself, as it does not appear that the deceased need have had anything to do with its compilation. It is, however, in its way an official document and it would have been a bold thing at that time to have inserted the name of one who did not at least visit the premises.

After the re-occupation a ration card was issued containing the names of the plaintiff and the deceased. It authorised rations for one male, one female and one child. It appears to have been signed by the deceased.

From this evidence I assume that a union of some kind existed between the deceased and the plaintiff and that it existed from about the year 1938 at the latest until the death of the deceased.

It also appears that in 1947 the deceased had a new slab placed on the tomb of his parents. In this appears the name of one Chin Fong, described as a grandson. It was argued that this was the son of the plaintiff. There was, however, evidence that there was another Chin Fong, a nephew of the deceased who disappeared during the Japanese occupation. In the circumstances I do not consider that this proves anything.

In these circumstances, is there enough evidence for me to assume that the deceased had given the plaintiff the status of a t'sip? I think that it is certain that he could have done so, even if he kept the relationship a secret. On the other hand, it was open to him to continue to maintain the plaintiff without doing so. I find it difficult to decide what the deceased might have thought about the matter, as I am quite sure that he would not have regarded the matter at all in the same light as it has been regarded by the Privy Council and other tribunals. In the absence of any evidence as to Chinese custom I find the matter very unsatisfactory; the decided cases do not reveal much on the subject. In any event the status of the t'sip is by this time a combination of discordant conceptions, Chinese and English, which means that any decision is unsatisfactory from the English or the Chinese point of view, probably from both.

After considerable hesitation I come to the conclusion that the plaintiff had acquired the status of a t'sip, as it has been declared by Courts composed of lawyers versed in English ideas. This conception is now part of the law of the Colony. It is now too late to reopen what has been decided in the *Six Widows Case*[2] and subsequently and to reduce the matter to one of Chinese custom.

In these circumstances I think that there must be judgment for the plaintiff. Costs out of estate.

Judgment for the Plaintiff.

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FEDERATION REPORTS.

CHENG SENG HENG & 4 OTHERS v. PUBLIC PROSECUTOR.*

[App. Crim. Juris. (Willan, C.J., Spenser-Wilkinson and Russell, JJ.) November 4, 1948]

[F.M. — Criminal Appeal No. 119 of 1948]

Emergency Regulations Rules 4, 5 and 33 — Statement to Police Officer — Statement elicited by cross-examination — Evidence Ordinance Ss. 24 and 29.

In this case the first appellant was convicted of possession of ammunition and the other four appellants were convicted upon a charge of consorting with a person who was carrying arms. The appeal of the first appellant was dismissed, as the Court found there was no misdirection by the learned trial Judge. The appeals of the other four appellants were based mainly on the fact that the statements made by them to the Police under S. 33 of the Emergency Regulations 1948 were recorded through the interpretation of a detective who himself took part in the raid. It also appeared that the statements were elicited by questions in the nature of cross examination. In dealing with the four appellants on the charge of consorting, the learned trial Judge did not take the opinions of the assessors but convicted them himself.

Held, (1) that under S. 33 of the Emergency Regulations the Police have no right to elicit statements from accused persons by means of cross-examination or anything in the nature of cross-examination; (2) that as the statements in this case were elicited by means of questions in the nature of cross examination, they were inadmissible in evidence; (3) that the learned trial Judge should have directed the assessors that as the interpreter used was himself interested in the case little reliance could be placed upon even those parts of the statements which were admissible; (4) that the learned trial Judge was wrong in not taking the opinions of the assessors upon the charge of consorting and in convicting the four appellants upon this charge himself and therefore the purported conviction by the learned Judge of the appellants on this charge cannot stand.

Semble: A charge of consorting should not as a general rule be joined with the capital charge of carrying or possession of arms or ammunition as the evidence admissible upon a charge of consorting is much wider in range than that which is admissible on the simpler issue of carrying or possession of an arm or ammunition and the effect of joining a charge in respect of this lesser offence is likely to have the effect of prejudicing the minds of the assessors in regard to the capital charge.

Cases referred to:—

(1) *Cheong See Leong v. Public Prosecutor* (1949) M.L.J. 67.

(2) *Ibrahim v. Rex* (1914) A.C. 599.

* The law has since been amended. See amendment to Emergency Regulations, Regulation 33 and **Poon Heong v. Public Prosecutor** (1949) M.L.J. 114.